



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Weaver Moore, Chairman  
Committee on State Affairs  
The Senate  
Austin, Texas

Dear Sir:

Opinion No. 6-3555  
Re: Constitutionality of S. B.  
399, exempting religious  
book stores from the tax  
imposed by Ch. 400, p. 1569,  
H. B. 18, G. & S. Laws,  
1st C. S., 44th Leg., 1935.

We are in receipt of your letter of March 26, 1941,  
in which you request the opinion of this Department as to the  
constitutionality of Senate Bill No. 399 now pending in your  
committee.

Senate Bill No. 399 is an amendment to Section 5 of  
House Bill No. 18, Acts of the Forty-fourth Legislature, First  
Called Session, 1935. Said Section now reads as follows:

"Sec. 5. Every person, agent, receiver, trustee,  
firm, corporation, association or copartnership  
opening, establishing, operating or maintaining one  
or more stores or mercantile establishments within  
this State, under the same general management, or  
ownership, shall pay the license fees hereinafter  
prescribed for the privilege of opening, establishing,  
operating or maintaining such stores or mercantile  
establishments. The license fee herein prescribed  
shall be paid annually and shall be in addition to  
the filing fee prescribed in Sections 2 and 4 of this  
Act. Provided that the terms, 'store, stores, mer-  
cantile establishment or mercantile establishments'  
wherever used in this act shall not include; whole-  
sale and/or retail lumber and building material

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businesses engaged exclusively in the sale of lumber and building material; and/or oil and gas well supplies and equipment dealers; or any place of business engaged exclusively in the storing, selling, or distributing of petroleum products and servicing of motor vehicles; or any business now paying an occupation tax measured by gross receipts; or any place or places of business used as bona fide wholesale or retail distributing points by manufacturing concerns for distribution of products of their own manufacture only; or any place or places of business used by bona fide processors of dairy products for the exclusive sale at retail of such products.

"The license fees herein prescribed shall be as follows:

"1. Upon one (1) store the license fee shall be One Dollar (\$1);

"2. Upon each additional store in excess of one (1) but not to exceed two (2), the license fee shall be Six Dollars (\$6);

"3. Upon each additional store in excess of two (2) but not to exceed five (5), the license fee shall be Twenty-five Dollars (\$25);

"4. Upon each additional store in excess of five (5) but not to exceed ten (10) the license fee shall be Fifty Dollars (\$50);

"5. Upon each additional store in excess of ten (10) but not to exceed twenty (20), the license fee shall be One Hundred Fifty Dollars (\$150);

"6. Upon each additional store in excess of twenty (20) but not to exceed thirty-five (35), the license fee shall be Two Hundred Fifty Dollars (\$250);

"7. Upon each additional store in excess of thirty-five (35) but not to exceed fifty (50), the license fee shall be Five Hundred Dollars (\$500);

"8. Upon each additional store in excess of fifty (50), the license fee shall be Seven Hundred Fifty Dollars (\$750);

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"Such fees are for the period of twelve (12) months, and upon the issuance of any license after the first day of January of any one year, there shall be collected such fractional part of the license hereinabove fixed as the remaining months in the calendar year (including the month in which such license is issued) bears to the twelve-month period."

The proposed Bill re-enacts Section 5 as above quoted in its entirety but includes at the end of the first paragraph after the word "products" the following provision:

". . .or any place or places of business commonly known as Religious Book Stores, operated for the purposes of selling Religious Publications of any nature, including Bibles, Song Books, Books upon Religious Subjects, Church Offering Envelopes, Church, Sunday-school and Training Union Supplies."

In other words, Senate Bill No. 599 proposes to include Religious Book Stores within the classifications to which "the terms, 'store, stores, mercantile establishment or mercantile establishments' wherever used in this Act" do not apply. It is the settled law of this State that the classifications set out in Section 5, supra, which are not "stores" are in fact exemptions from the Store Tax Law. See *Hurt v. Cooper*, 110 S. W. (2d) 896, Supreme Court of Texas, and *Standard Oil Co. of Texas v. State*, 142 S. W. (2d) 519, Court of Civil Appeals of Texas at Eastland, writ of error refused by the Supreme Court of Texas.

Apparently the only constitutional question that could be raised is whether or not the proposed bill violates Section 2 of Article 8 of the Constitution of Texas which reads in part as follows:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; . . ."

It is our opinion, however, that this question has undoubtedly been decided by the decision of the Supreme Court of Texas in

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the case of *Hurt v. Cooper*, supra. In that case the contention was made that the tax act in question was unconstitutional because of the exemption contained in Section 5, supra. The court quoted from the opinion of the Supreme Court of Texas in the case of *Texas Company v. Stephens*, 100 Tex. 628, 103 S. W. 461, as follows:

" . . . 'The very language of the Constitution of the state implies power in the Legislature to classify the subjects of occupation taxes and only requires that the tax shall be equal and uniform upon the same class. Persons who, in the most general sense, may be regarded as pursuing the same occupation, as, for instance, merchants, may thus be divided into classes, and the classes may be taxed in different amounts and according to different standards. Merchants may be divided into wholesalers and retailers, and, if there be reasonable grounds, these may be further divided according to the particular classes of business in which they may engage. The considerations upon which such classifications shall be based are primarily within the discretion of the Legislature. The courts, under the provisions relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the businesses classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature. This is the rule in applying both the state and federal Constitutions, and it has been so often stated as to render unnecessary further discussion of it.' "

The Supreme Court in the *Hurt v. Cooper* case stated that the Legislature could exempt certain types of business which were selling commodities different from those sold at places of business subject to the tax. The court stated as follows:

"It would not be argued that the Legislature is without power to levy a tax upon dry goods merchants without at the same time levying a like tax upon grocery merchants. The fact that the merchants not

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taxed, or those exempted from the tax, sell a different kind of goods from those which are taxed, is an all-sufficient justification of the classification or exemption. This is well established."

"The contentions with reference to most of the so-called exemptions may be disposed of by the mere statement that the kinds of goods sold by the exempted stores are different from those sold by the taxed stores. . ."

We believe that the decision of the court as to the various classifications in Section 5, supra, would apply to the proposed additional classification of "Religious Book Stores." It is our opinion, therefore, that Senate Bill No. 399 is constitutional.

Yours very truly

APPROVED APR 2, 1941

ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL

By

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BG:N

